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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-18

CALVIN EUGENE HUFFMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY BRIEF

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Calvin Eugene Huffman, Petitioner, submits this Reply Brief in support of his Petition for Writ of Certiorari to review the adjudgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 5, 1975.

OPINION BELOW AND JURISDICTION

The Opinion below is contained in the Appendix of Petitioner's Petition for Writ of Certiorari and the grounds for jurisdiction are cited in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

A. Did Sgt. Huffman make a sufficient objection to the instruction of the trial court regarding what

constitutes "dealing" to comply with the provisions of Rule 30 of the Federal Rules of Criminal Procedure?

B. If Sgt. Huffman did not make sufficient objection to the trial court's instruction regarding what constitutes "dealing", was the giving of that instruction "plain error" and reviewable under the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure?

RULES INVOLVED

Rule 30
Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 32
Harmless Error and Plain Error

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Subsequent to the STATEMENT OF THE CASE contained in the Petition for Writ of Certiorari, the United States filed a Memorandum in Opposition to the Petition for Certiorari asserting that Sgt. Huffman is barred from contending, that the Court of Appeals erred in not remanding the case for a new trial because its construction of Section 922(a)(1) contained different elements than the trial court's instruction, because Sgt. Huffman failed to object to the trial court's instruction in the manner required by Rule 30 of the Federal Rules of Criminal Procedure.

STATEMENT OF FACTS

Sgt. Huffman filed at the trial level a Motion to Dismiss the Indictment because Section 18 U.S.C. 922(a) was unconstitutionally vague as to what constituted "dealing" and argued the point at some length. (A. 70-80, 86-87, 92-95) [1] He further indicated to the court that he intended to offer a specific intent instruction to cure the vagueness of the statute. (A. 74-95). He did offer the court an instruction requiring the jury to find beyond a reasonable doubt, "that the defendant did intentionally, willfully and knowingly hold himself out to members of the public as a dealer in firearms and . . . intentionally, willfully, and knowingly engage in the business of dealing in firearms and ammunition . . ." (A. 96). The Court denied this instruction and outlined the instruction the Court did give on the elements of "dealing". (A. 55-56). When the Court had stated its proposed instruction, counsel for Sgt. Huffman stated, "Your Honor, for the record I don't

[1] A. is the Appendix submitted on appeal to the Circuit Court.

like to be repetitious, but does the court like for me to note an exception?", and the court replied, "No, you don't have to note exceptions in Federal court." (A. 56).

The court then instructed the jury outlining the elements of "dealing" in firearms as follows:

> In deciding whether the defendant was engaged in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling.
>
> First, the number and type of firearms and quantities of ammunition that were owned, purchased, or sold by the defendant; the number of firearms 'built up' or assembled by the defendant, or caused to be built up or assembled by him;
>
> Whether the defendant made a profit from any sale or transaction involving firearms or ammunition;
>
> The frequency of those transactions;
>
> The purpose for which the firearm or ammunition was owned or possessed by the defendant;
>
> The extent to which the defendant devoted time, attention, and effort to the endeavor of selling firearms or ammunition or repairing or assembling guns.
>
> A person who collects firearms for his own use or enjoyment and toward that purchase occasionally buys or sells a gun is not dealing in firearms within the meaning of the law.
>
> Of course, he is not charged just with dealing in firearms. He is charged with dealing in ammunition.
>
> It is not necessary for the government to prove any specific number of transactions. A person

> can be a small dealer as well as a large dealer. Nor is it necessary that any actual profit be shown by the government.
>
> It need not be his only business, but the test is: Was any selling of firearms or ammunition or building up of firearms a business as distinguished from a hobby?
>
> To be a sale, of course, the transfer of ammunition or firearm need not be for cash. It can be for a commodity.
>
> If, for example, as contended by the government, the ammunition was transferred by the defendant in exchange for a commodity such as another gun, this would constitute a sale. (A. 63-67).

At the end of the court's instructions, Sgt. Huffman objected that his instructions were not given. (A. 74). The jury went out at 11:20 on July 24, 1974, and at 2:51 P.M. on that day, asked to be charged on what constituted the business of dealing in firearms. The jury deliberated that day until 6:12 P.M. without reaching a verdict and deliberated for approximately two hours on the following day before the guilty verdict was returned as to Huffman. (Tr. 331, 333, 336).

On appeal to the Fourth Circuit Court of Appeals, Sgt. Huffman again contended that 18 U.S.C. § 922(a) was unconstitutionally vague. (App.Br. 6-12). He specifically objected to the trial court's instruction as follows: "The thrust of the court's instruction in the present case is that what constitutes 'business of dealing in firearms' depends entirely upon the circumstances. It is not necessary that a profit be made or that the Government prove any special number of transactions. It appears to be a crime with a number

of elements, no one of which is necessary for conviction and no particular combination thereof is necessary for conviction.

"... The court involved could not define the conduct prohibited by the statute. How was Sgt. Huffman to know prohibited conduct?" (App.Br. 11).

The Court of Appeals held that to prove "dealing" in firearms, the U.S. must show "a willingness to deal, a profit motive, and a greater degree of activity than occasionally sales by a hobbyist." The court went on to state, "So construed, the statute is not vague as applied to Huffman." (App. 1a-3a).[2]

Sgt. Huffman contends in Reason B in his Petition for Certiorari that the Court of Appeals erred in not remanding the case for a new trial because the Court of Appeals construed the elements necessary to convict him differently from the instructions of the trial court. (Pet. 12-15). The government contends that question is not to be noticed because the Petitioner did not object to the trial court's instruction below or raise the matter on appeal as required by Rule 30 of the Federal Rules of Criminal Procedure. The government further contends that the giving of the instruction by the trial court, which conflicts with the Circuit Court's definition of dealing, is not plain error under the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure.

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[2] App. is the Appendix attached to the Writ for Certiorari filed herein.

ARGUMENT

A. Sgt. Huffman Made Sufficient Objection To The Instruction Of The Trial Court Regarding What Constitutes "Dealing" To Comply With The Provisions Of Rule 30 Of The Federal Rules Of Criminal Procedure.

The trial court's instruction, as set forth in the Statement of Facts, does not have the necessary elements to constitute dealing and is as vague as the basic statute upon which it is clearly based. Construction of the basic statute by the Fourth Circuit clearly defines the three necessary elements of "dealing" and if Sgt. Huffman had been tried under instructions delineating these elements, he could not complain as to vagueness of the statute now. However, Sgt. Huffman, despite his efforts to point out vagueness problems involved, was tried under the trial court's vague instructions which closely followed the statute.

Sgt. Huffman filed a Motion to Dismiss the Indictment on the grounds of vagueness and repeatedly argued the point at a Motions hearing. (A. 78-80, 86-87, 92-95). He suggested to the trial court that construing § 18 U.S.C. 922 (a) to require specific intent would be a possible solution to the vagueness of the statute. (A. 94-95). Huffman offered an instruction which required a "holding out" as a dealer and a specific intent to deal which the trial court denied. (A. 96). He did object to the instruction given on what constitutes "dealing" when the court proposed it and did not give any detailed reasons as to his objection because the court stated no exceptions were necessary in Federal court. (A. 56). After the court instructed

the jury, Sgt. Huffman again objected that the instructions offered by him were not given. (A. 74).

Then, Huffman again raised the vagueness of the statute on appeal and specifically characterized the instruction of the trial court as being vague. (App.Br. 11).

Sgt. Huffman again and again objected to being tried under the vague standards of the statute and offered solutions to solve the vagueness.The trial court's instructions were in the terms of the statute and vague. Sgt. Huffman's objections had sufficiently pointed out this problem to comply with Rule 30. Sgt. Huffman did not request an instruction specifically containing the elements of dealing as construed by the Fourth Circuit, but Rule 40 does not require such perspicacity, it only requires a distinct objection.

Sgt. Huffman's approach was that construing the statute to require specific intent would cure the vagueness problem. The Court of Appeals did not choose to follow this approach and in view of their decision to narrow the construction of the statute, that does not appear to be error on the Court of Appeals' part. However, it is difficult to imagine that Sgt. Huffman would be held to predict the exact solution to the vagueness problem that the Fourth Circuit Court of Appeals would choose.

The decision of this court in *Screws* v. *U.S.*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) clearly shows that a possible solution to a vague statute is that the statute be construed to require specific intent. Sgt. Huffman chose to suggest to the trial court that method which while not required would have solved the vagueness problem in the present case. The trial court chose not to make any effort narrowing the construction of

the statute, despite Sgt. Huffman's efforts to point out that the statute was vague. Sgt. Huffman did comply with Rule 30 in this case.

B. Even If Sgt. Huffman Did Not Make Sufficient Objection To The Trial Court's Instruction Regarding What Constitutes "Dealing", The Giving Of That Instruction Was Plain Error Under Rule 52(b).

The instruction given by the trial court violates the basic elemental rights guaranteed to every defendant. Every defendant is entitled to have the jury pass on the elements of the crime involved and find him guilty of all those elements beyond a reasonable doubt. This proposition is too basically entrenched in our judicial system to even require the cites of authorities.

In the present case the trial court instructed the jury, beginning with the following phrase, "In deciding whether the defendant was engaged in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling." (A. 63-64). The trial court then went on to list several factors which the jury could take into account. The Court of Appeals defined the elements of dealing to be as follows: "it *must* show a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist.

"So construed, the statute is not value as applied to Huffman." The conflict between the approaches of the two courts is obvious. The trial court has listed several items which the jury *may* take into account and the Appeals Court has clearly established three elements that constitute the crime of "dealing" in firearms that *must* be found beyond a reasonable doubt

before Huffman could be found guilty. Huffman was not allowed a trial on these elements of the crime. The Court of Appeals obviously construed § 18 U.S.C. 922 (a) in such a way as to save it from unconstitutional vagueness by ruling that dealing was comprised of three definite elements, as set forth above.

This is exactly the same situation as occurred in *Screws* v. *U.S.*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945). The case involved a violation of 18 U.S.C. 88, § 20 which made criminal *wilfully depriving another of his Civil rights.* The defendant had been convicted under that statute. He appealed claiming that the statute was unconstitutionally vague. In order to keep from holding the statute unconstitutionally vague this court construed *wilfully* so as to require specific intent.

The situation is exactly the same as we have in the present case. The Court of Appeals in the present case has construed "dealing" to have three definite elements in order to keep from finding it unconstitutionally vague as did the court in *Screws.*

At 325 U.S. 106-107, the Court in *Screws* stated as follows: "The difficulty here is that this question of intent was not properly submitted to the jury with proper instructions. The court charged the Petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner's alleged assault. But in view of our construction of the word 'wilfully' the jury should have been further instructed that it was not sufficient that Petitioners had a generally bad purpose. To convict it was necessary for them to find that Petitioners had the purpose to

deprive the prisoner of a Constitutional right, e.g. the right to be tried by a court rather than by ordeal. And in determining whether that requisite bad purpose was present the jury could be entitled to consider all the attendant circumstances—the malice of the Petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like.

"It is true that no exception was taken to the trial court's charge. Normally we would under these circumstances not take note of the error. . . . But there are exceptions to that rule. . . . And where the error is so fundamental as to not submit to the jury the essential ingredients of the only offense on which conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous of offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried with the standards of guilt which Congress has prescribed."

In the present case, as in the *Screws* case, the defendant has been deprived of the trial by an error so fundamental so as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest. The only elements upon which the conviction for dealing could rest were defined by the Fourth Circuit after Sgt. Huffman had been tried and the jury was not instructed that these ingredients were essential or even necessary to convict him. The *Screws* case clearly indicates that an error so fundamental is not waived by the failure to object.

The *Screws* case is controlling authority, not only that an objection is not necessary and that the trial court's instruction is plain error under Rule 52(b),

but also is controlling authority that the Court of Appeals erred in not remanding the case for a new trial.

The cases of *Terminiello* v. *City of Chicago,* 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1137 (1949) and *Stromberg* v. *California,* 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) are also authorities controlling the present case. In those cases, the defendant had attacked a statute as unconstitutionally vague. In neither one of those cases had the defendant objected to an instruction based on the unconstitutionally vague statute at his trial. The Courts held that the defendant was not precluded from raising the vagueness of the statute by his failure to object to the instruction and found the statute unconstitutionally vague and reversed the convictions in both cases. Like the defendants in *Terminiello* and *Stromberg,* Sgt. Huffman has attacked the statute in the present case in the grounds of vagueness. The clear implication of the Fourt Circuit opinion is that the construction applied to Sgt. Huffman at trial was unconstitutionally vague and thus Sgt. Huffman is in the same position as the defendants in *Terminiello* and *Stromberg.* In *Terminiello* at 337 U.S. 5, the Court said, "The fact that Petitioner took no exception to the instruction is immaterial. No exception to the instructions was taken in *Stromberg* v. *California.* . . . The statute had been challenged as unconstitutional, and the instruction was framed in this language. . . . The principle of that case controls this one."

As the above language from the *Terminiello* case clearly shows when the basic point raised is vagueness of the statute, the instructions given by the court based upon that statute need not be challenged to

allow the point to be raised in the Appellate Courts. That is the exact situation we have in the present case.

All the cases cited clearly dictate that the error involved in the present case is of such a substantial nature that it is plain error as that term is used in Rule 52(b) and may be noticed by the court whether or not a sufficient objection was raised below.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted for the reasons stated in the Petition for Writ of Certiorari and for the reasons set forth above in Petitioner's Reply Brief.

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